GBH CERAMICS SDN. BHD.

v.

HOW IT & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ANUAR ZAINAL ABIDIN J
[CIVIL SUIT NO. D1-23-1249-88]
27 MARCH 1989

CONTRACT: *Goods sold and delivered - Guarantee as security for payment - Whether past consideration - Whether consideration was sufficient in law.*

By a written guarantee and indemnity, the defendants jointly and severally guaranteed as principal debtor the payment on demand of all monies and obligations of one Heng Lee Enterprise Sdn. Bhd. due and owing to the plaintiff under a goods sold and delivered contract.

The company later defaulted in payment. Plaintiff obtained judgment and subsequently filed an action against the defendants as guarantors. Defendants averred that the guarantee and indemnity as void and unenforceable as no consideration was given by the plaintiff. Further the defendant argued that the consideration even if given was void for past consideration because the goods were sold and delivered over a period of time before the guarantee and indemnity were executed subsequently.

The learned SAR granted conditional leave to defend. The defendant being dissatisfied appealed to the High Court.

Held:

[1] It is clear from the letter of guarantee that the plaintiff's act was done at the defendant's request and that the defendants had full knowledge of the trading and credit facilities extended by the plaintiff to the company. There is therefore no mistake as to the monies that the defendants as guarantors agree to guarantee repayment upon.

[2] It is the intention of the parties that the guarantors gave the guarantee not only for liabilities incurred after but also before the signing of the guarantee. In the event, there is doubt as to the *bona fide* of the defence, leave to defend should be conditional.

[Appeal dismissed with costs.]

Cases referred to:

Pao On & Ors. v. Lau Yiu Long & Ors. [1980] AC 614
Morrell v. Cowan [1877] VII Ch. Div. 151
Carlsberg Brewery Malaysia Berhad v. Soon Heng Aw & Sons Sdn. Bhd. & Ors. [1988] 1 CLJ (Rep) 420

For the plaintiff/respondent - C.G. Lee; M/s. Lee Boon Peng & Co.
For the defendants/appellants - L. Tan; M/s. Chooi & Co.

JUDGMENT

Anuar Zainal Abidin J:

This is an appeal by the defendants against the decision of the learned Senior Assistant Registrar given on 16 January 1989 giving the defendants conditional leave to defend upon condition that the sum of RM249,233.45 to be deposited with the Court.

By a written guarantee and indemnity dated 11 June 1986 the 1st and 2nd defendants jointly and severally guaranteed as principal debtors the payment on demand of all monies and obligations of one Heng Lee Enterprise Sdn. Bhd. (hereinafter referred to as the "company") due and owing to the plaintiffs up to a limit of RM350,000.

The company incurred debts to the plaintiffs. The plaintiffs filed an action against the company and obtained judgment against the company in the sum of RM249,223.45 on 9 November 1987.

By two separate letters of demand dated 25 March 1988 the plaintiffs through their solicitors demanded payment of the sum of RM249,223.45 with interest from the 1st and 2nd defendants.

The defendants in their defence raised two issues. The defendants averred that the guarantee and indemnity is void and unenforceable as no consideration was given by the plaintiffs. Further the defendants averred that the consideration given is void for past consideration.

How Chuan Hing, the 2nd defendant, in his affidavit (encl. 6) stated that the goods sold and delivered to the company which formed the subject matter of the plaintiffs' claim under Civil Suit D2-23-722-87 were from 11 September 1985 to 28 March 1986. Whereas the letter of guarantee and indemnity was executed subsequently at a later date on 11 June 1987. In the event the consideration given was a past consideration and therefore void.

The first question is whether upon its true construction the written guarantee of 11 June 1986 states a consideration sufficient in law to support the defendants' promise to pay monies due to the plaintiffs from the company.

The relevant terms of the letter of guarantee states that in consideration of the plaintiffs agreeing to supply goods and giving credit to the company the defendants agreed to:

> ...do hereby jointly and severally guarantee, as principal and not merely as sureties the payment on demand all monies due to you and discharge all the trading liabilities incurred by you by the customer...

It is also clear from the letter of guarantee and it cannot be denied that the plaintiffs' act was done at the defendants' request.

Now the extent of the guarantors' liabilities must be found from the clear and unambiguous terms from which the intention of the parties can be gathered.

Reading the letter of guarantee in the present case it is clear that the guarantors had full knowledge of the trading and credit facilities extended by the plaintiffs to the company. There is therefore no mistake as to the monies that the guarantors agree to guarantee repayment upon. The monies represent the credit given to the company for the goods supplied by the plaintiffs.

I am of the view that it is the intention of the parties that the guarantors gave the guarantee not only for liabilities incurred after but also before the signing of the guarantee.

There is therefore doubt as to the *bona fide* of the defence but merely an attempt to delay the process of the Court. Where there is doubt as to the *bona fide* of the defence, leave to defend should be conditional.

With respect I agree with the decision of the learned Senior Assistant Registrar and would dismiss this appeal with costs.

Also found at [1989] 2 CLJ 427